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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

75-1906

ROBERT J. HENDERSON, Superintendent, Auburn Correctional Facility, Auburn, New York,

Petitioner,

against

BARRY WARREN KIBBE,

Respondent.

BRIEF FOR PETITIONER

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Opinions Below

The opinion of the Court of Appeals for the Second Circuit is reported at 534 F. 2d 493 and appears in the appendix at A. 105-120. The opinion of the United States District Court for the Northern District of New York is unreported and is reproduced in the appendix at A. 20-23.

Jurisdiction

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). The judgment of the Court of Appeals was entered on April 8, 1976 and an order amending the judgment and opinion was entered on May 4, 1976. A timely petition for rehearing or rehearing *en banc* was denied on May 21, 1976.

Question Presented

Did the challenged jury instruction regarding causation deprive respondent Kibbe of a fundamentally fair trial when the issue of causation was focused for the jury by both defense counsel and the prosecution throughout the trial and in their summations?

State Statute Involved

Former New York Penal Law:

"§ 125.25 Murder in the second degree

A person is guilty of murder in the second degree when:

• • •

2. Under circumstances evincing a depraved indifference to human life, he recklessly engages in conduct which creates a grave risk of death to another person and thereby causes the death of another person;"

Statement of the Case

A. Introduction

Respondent Barry Warren Kibbe is presently confined pursuant to a judgment of conviction for the crimes of murder in the second degree, robbery in the second degree, and grand larceny in the third degree, rendered by the Monroe County Court after a trial by jury. Respondent was sentenced to 15 years to life on the murder count, 5 to 15 years on the robbery count, and up to 4 years on the grand larceny count. His conviction was affirmed by the Appellate Division, *People* v. *Kibbe*, 41 A D 2d 228, 342 N.Y.S. 2d 386 (4th Dept. 1973), and the Court of Appeals. 35 N Y 2d 407, 362 N.Y.S. 2d 848, 321 N.E. 2d 773 (1974).

B. The Crime

On December 30, 1970, the victim of this crime, one George Stafford, was drinking heavily in a Rochester bar with Kibbe and his co-defendant, Roy Krall. Stafford, who was thoroughly intoxicated, had been flashing one hundred dollar bills in the bar. He inquired if anyone would give him a ride and Kibbe and Krall, who later confessed that they had already decided to steal his money, agreed. After another few drinks in another bar, they entered Kibbe's car at approximately 9:30 P.M.

While Krall drove, Kibbe slapped Stafford several times and took his money. Kibbe made Stafford lower his trousers and take off his boots to prove that he had no more money. Stafford was then abandoned on the shoulder of a rural and unlit, two-lane road which was snow-banked on both sides. Stafford, who was still in a state of partial undress, was left deserted with his jacket and boots placed next to him. His eyeglasses, which he wore at all times, were left in the car.

The temperature was near zero and gusting winds at times obscured visibility, although it was not snowing. The road was not lighted and there were no nearby buildings. The closest structure was an open gasoline station which was located on the *other* side of the highway. Conflicting testimony placed the building from 75 feet to one quarter of a mile from the spot where Stafford was left.

At approximately ten o'clock that night, William Blake, a college student, was driving northbound on the same road at 50 miles per hour, 10 miles over the speed limit. Two approaching cars flashed their headlights at his pick-up truck. Immediately thereafter he saw Stafford sitting in the middle of the road. Blake went into shock and did not have time to react; he hit Stafford. He stopped to aid Stafford, who was not wearing his jacket or boots. Stafford died shortly thereafter of massive head injuries. Tests by the medical examiner revealed a high degree of intoxication.

C. The Trial and Charge to the Jury

Kibbe and his co-defendant were indicted, *inter alia*, for murder in the second degree, former N.Y. Penal Law § 125.25(2), which provided that a person is guilty of murder when:

> "2. Under circumstances evincing a depraved indifference to human life, he recklessly engages in conduct which creates a grave risk of death to another person, and thereby causes the death of another person."

The issues of causation and foreseeability were foremost in the minds of counsel. At oral argument of a pretrial motion to dismiss the indictment, Kibbe's counsel contended that there was insufficient evidence before the grand jury to support the murder charge (A. 24-25).* In reply, the prosecutor argued that given the circumstances of that evening, it was certainly within the knowledge and expectation of the defendants that death by vehicle might result (A. 26-27). Kibbe's attorney responded that death by vehicle was too "attenuated" from defendants' activities to support the charge (A. 27-28). The motion was denied.

In his opening remarks to the jury, the trial judge instructed that the opening statements by counsel may be considered a preview of what each side intends to prove (A. 41). The prosecutor specifically argued that he would prove that knowledge of Stafford's condition and the co-defendants' conduct indicated a depraved indifference to human life which "ultimately caused the death of Mr. Stafford" (A. 44). He pointed out that there was no allegation of intent to cause death. The prosecutor argued further that:

> ". . . their [the co-defendants'] acts, perhaps it [sic] was not the sole cause of death, because quite obviously, the direct or precedent agent of the catalyst causing the death was the truck driven by Mr. Blake. But nevertheless, their acts were responsible and were a cause, an approximate cause of the death of Mr. Stafford" (A. 44).

* References to the appendix submitted to this Court are preceded by the letter "A".

As the Court of Appeals found, it was clearly the strategy of defense counsel, both before and during the trial, to demonstrate that the immediate and culpable cause of Stafford's death was not defendants' conduct but Blake's operation of the truck (A. 110-112). To this end, Blake and the medical examiner were vigorously cross-examined by the defense (Blake, A. 48-53; Medical Examiner, Tr. 671-675).*

At the close of the prosecution's case, defense counsel against sought dismissal of the indictment (A. 29-39). Krall's attorney argued tht the cause of Stafford's death was the vehicle and that Krall was under no obligation to anticipate such a result (A. 29). Kibbe's attorney also argued that Stafford's death could not have been foreseen (A. 32). The assistant district attorney replied directly (A. 35-37). The motion was denied then and again at the close of the entire case when it was renewed (A. 40).

The summations of counsel dealt not only with issue of causation of death but also focused directly on foreseeability and intervening causes. Kibbe's counsel read the language of the indictment, accenting the elements of the crime. He argued that the jury would have to conclude that Kibbe was in a position to "perceive and disregard" a grave risk to Stafford. Counsel contended that Kibbe was not bound to anticipate that Stafford would sit in the middle of the road and that a speeding driver would happen by and freeze at the wheel (A. 68). Krall's attorney told the jury that if there were any depraved indifference

* References to sections of the trial transcript not included in the appendix are preceded by "Tr.". The transcript is being filed with the Clerk of this Court by respondent's attorney.

to human life, it was on behalf of motorist Blake, who failed to act and accordingly "caused" Stafford's death (A. 70).

The prosecution's summation was equally on point. The assistant district attorney repeatedly argued that defendants' reckless conduct caused Stafford's death (A. 72-76). He stated precisely why he believed that death by vehicle could have been anticipated by defendants (A. 73-75). Finally, the prosecutor spoke directly on the issue of causation and intervening events:

> "As I mentioned not only does the first count contain reference to and require proof of a depraved indifference to a human life, it proves [sic] that the defendant recklessly engaged in conduct which created a risk of death in that they caused the death of George Stafford. Now, I very well know, members of the jury, you know, that quite obviously the acts of both of these defendants were not only the direct or the most preceding cause of his death. If I walked with one of you downtown, you know, and we went across one of the bridges and you couldn't swim and I pushed you over and you drowned because you can't swim, I suppose you can say, well, you drowned because you couldn't swim. But of course, the fact is that I pushed you over. The same thing here. Sure, the death, the most immediate, the most preceding, the most direct cause of Mr. Stafford's death was the motor vehicle . . . But how did he get there? Or to put it differently, would this man be dead had it not been for the acts of these two defendants? And I submit to you, members of the jury, that the acts of these defendants, did indeed cause the death of Mr. Stafford." (A. 75-76).

The trial court specifically instructed the jurors that the arguments of counsel were advanced for their help and could be followed as long as they were based on evidence in the record (A. 82).

The trial judge began his charge to the jury by reading the indictment; the count charging second degree murder followed the language of the statute (A. 77). While the judge defined the terms "recklessly," "depraved," "grave," and "indifferent", he did not specially define "cause" (A. 89-90). He did charge that *all* elements of the crime must be proved beyond a reasonable doubt and immediately followed this instruction with a reiteration of the elements of second degree murder (A. 90-91). Preceding his charge on manslaughter, the judge instructed that it should not be considered unless the jury felt that the defendants were guilty of causing Stafford's death (A. 91).

Upon its own request, the jury was given a copy of the indictment so the language of the various counts would be before them (A. 101; see A. 98-99). As previously stated, the indictment followed the language of the statute. The judge stated:

> "This copy of the indictment is given to you only so you can see what words are used and the different counts and consider whether the evidence as you find it has met the burden of proof of which I advised you." (A. 101).

When the jury returned a few hours later and requested an explanation of all four counts, the Court repeated the exact language of § 125.25(2) and said:

> "*All* of these factors must coincide to render a person guilty of murder under that section." (A. 104) (emphasis added).

The defense was satisfied that the issue of causation was sufficiently and properly before the jury; there was no objection to this aspect of the charge and no request for a separate instruction on causation.

D. Prior State Proceedings

Kibbe's judgment of conviction was affirmed on appeal. His brief to the Appellate Division did not challenge the jury charge. However, the dissenting judge in the Appellate Division *sua sponte* raised the issue of the jury charge and held that he would reverse in the interest of justice (N.Y. Crim. Pro. Law § 470.15[3][c], [6][a]) because the instruction was inadequate. *People* v. *Kibbe, supra,* 41 A D 2d at 230-233. While noting the defendants' failure to challenge the charge, the majority did consider it in the interest of justice. Although lacking in detail, the Court held that "the charge together with the language of the statutes and indictment and the evidence were sufficient to inform the jury on this subject and reversal of the judgments is not required in the interest of justice." *Id.* at 230.

The Court of Appeals refused to disturb the Appellate Division's discretionary determination that the conviction would not be reversed in the interest of justice. *People* v. *Kibbe, supra,* 35 N Y 2d at 413-414.

E. Prior Federal Proceedings

Petitioner's habeas corpus application to the United States District Court for the Northern District of New York was denied on June 27, 1975 (A. 20-23). As to the challenge to the jury instruction, the Court held that the claim did not raise a question of federal constitutional dimensions (A. 21).

On April 8, 1976, the Court of Appeals reversed, granting the writ as to the murder conviction, with a dissent by Judge Mansfield (A. 105-120).* The majority of the panel

* Petitioner also claimed that certain evidence admitted at trial should have been suppressed. Assuming *arguendo* the issue cognizable on habeas corpus, the Court held that it was without merit (A. 106 n. 1).

On its own, the Court of Appeals raised the question of whether

(footnote continued on following page)

reasoned that the failure of a trial court to adequately instruct a jury on any element of the crime deprives the defendant of his right to have the jury apply the reasonable doubt standard to that element and make a finding that the proof on that element is sufficient beyond a reasonable doubt (A. 112, 116-117).

While recognizing that the evidence and summations by counsel raised the issue of causation (A. 110-112), the majority did not evaluate the challenged instruction within the context of the entire charge and the whole trial as required by this Court's decision in *Cupp* v. *Naughten,* 414 U.S. 141. 147 (1973). Indeed, the majority did not cite the *Cupp* decision.

The Court faulted the trial judge for his failure to define causation when he defined the other elements of the crime. The Court speculated that the jury may have concluded that the issue of causation may not have been before it or that it could infer causation from the chronological sequence of events (A. 113). Alternatively, even if the jurors were aware of their duty to determine causation, the majority thought that the instruction was inadequate to the task because the legal standard was complex. The Court stated that with a proper instruction as to intervening force, supervening cause, and foreseeability, the jury might have found that Kibbe did not foresee or could not have foreseen that the victim would have been struck by a truck (A. 113-116).

(footnote continued from preceding page)

Kibbe had deliberately bypassed orderly state procedures by failing to object to the charge and concluded that the omission was not strategic but inadvertent (A. 109-112). The Court predicated its discussion on the erroneous conclusion that the jury charge had not been reviewed by the state courts (A. 109). However, it is clear that the Appellate Division exercised its statutory discretion and reviewed the charge in the interest of justice. *People* v. *Kibbe, supra,* 41 A D 2d at 230. See *ante* at 8. Since the state court entertained the claim on the merits, Kibbe could not be barred from seeking federal habeas corpus relief and discussion of deliberate bypass was not indicated. *Fay* v. *Noia,* 372 U.S. 391, 439 (1963). See also *Lefkowitz* v. *Newsome,* 420 U.S. 283, 292 n. 9 (1975).

Judge Mansfield, dissenting (A. 117-120), held that the challenged charge did not reach constitutional dimensions entitling Kibbe to habeas corpus relief. In obvious agreement with Kibbe's own defense attorney and the Appellate Division, the dissent found that against the background of the summations and the overall charge, the jury was plainly aware of the necessity of finding that defendants' conduct was the cause of death, although it may not have been the only cause. "In these circumstances the court's instruction was sufficient to enable the jury intelligently to go about its business" (A. 120). Accordingly, the absence of a more definitive instruction on the element of causation did not raise an issue of fundamental fairness sufficient to reverse a state conviction in a federal habeas corpus proceeding.

ARGUMENT

When the challenged jury instruction is evaluated in the context of the entire charge and trial, as required by *Cupp* v. *Naughten*, 414 U.S. 141 (1973), it is manifest that respondent Kibbe received a fundamentally fair trial.

A.

Ordinarily, the sufficiency of a jury instruction in a state criminal trial is a matter of state law only; absent a showing that the alleged error deprived the defendant of a federal constitutional right, the charge is not reviewable by a federal court.* A jury instruction challenged under the Due Process Clause is elevated to such a violation only if the giving of the instruction "so offended established notions of due process as to deprive the respondent [defendant] of a constitutionally fair trial." *Cupp* v. *Naughten* ("Cupp"), 414 U.S. 141, 144 (1973).

* E.g. *Buchalter* v. *New York*, 319 U.S. 427, 431 (1943); *United States ex rel. Stanbridge* v. *Zelker*, 514 F. 2d 45, 50 (2d Cir. 1975); *United States ex rel. Smith* v. *Montanye*, 505 F. 2d 1355, 1359 (2d Cir. 1974).

The exceptional case can be made out only after analyzing the instruction under the carefully delineated standard propounded in *Cupp*, 414 U.S. at 147. The Court below did not make such ananalysis and erroneously concluded that respondent Kibbe's due process right was violated because the state trial judge did not define the word cause for the jury.

The mandate in *Cupp* was clear:

> "In determining the effect of this instruction on the validity of respondent's [state] conviction, we accept at the outset the well-established proposition that a single instruction may not be viewed in artificial isolation but must be viewed in the context of the overall charge. *Boyd* v. *United States*, 271 U.S. 104, 107 (1926). While this does not mean that an instruction by itself may never rise to the level of constitutional error, see *Cool* v. *United States*, 409 U.S. 100 (1972), it does recognize that a judgment of conviction is commonly the culmination of a trial which includes testimony of witnesses, argument of counsel, receipt of exhibits in evidence, and instruction of the jury by the judge. Thus, not only is the challenged instruction but one of many such instructions, but the process of instruction is but one of many components of the trial which may result in the judgment of conviction." *Cupp*, 414 U.S. at 147.

Accord, United States v. *Park*, 421 U.S. 658, 674-675 (1975); *Boyd* v. *United States*, 271 U.S. 104, 107 (1926).*

In *Cupp, supra*, a state prisoner seeking habeas corpus relief challenged the giving at his trial of a presumption-of-truthfulness instruction, claiming that it conflicted with or shifted the prosecution's burden to prove guilt beyond a reasonable doubt. The instruction at issue had been

* Conversely, recognition that a jury will consider the entire proceeding, despite instructions to the contrary, was the basis for this Court's holding in *Bruton* v. *United States*, 391 U.S. 123 (1968).

almost uniformly condemned by the federal courts of appeals. 414 U.S. at 143-144 and n. 4. This Court reiterated the well-established proposition that a challenged jury instruction must be evaluated in light of the entire proceeding and carefully noted the distinction between trial error which can be corrected in the exercise of an appellatee court's supervisory authority and constitutional error which would justify the reversal of a state conviction. *Id.* at 145-146 (see *post* at 17).* This Court found no fundamental unfairness when the allegedly ailing instruction was viewed in light of the entire charge, which included instructions on the presumption of innocence, the State's burden of proof, and the credibility of witnesses.

In the case at bar, the Court of Appeals made no such analysis. In discussing the possibility of deliberate bypass (see *ante* at 8-9n*), the Court found that the clear strategy of the defense was to demonstrate that the cause of death was due to the motorist's conduct, not the defendants'. Some of the "constant references" to causation, said the Court, were the cross-examinations directed to this end and the discussion of causation in counsel's summations (A. 110-112). Nonetheless, when the Court reached the second aspect of its decision, the alleged error in the charge, it did an abrupt about-face and held that the failure of the trial judge to define causation allowed the jury to conclude that the issue was not before them or could be merely inferred

* Similarly, due process analysis requires that a claim regarding a prejudicial comment by a prosecutor be evaluated in the context of the entire trial since it is but "one moment" of the proceeding. *Donnelly* v. *DeChristoforo*, 416 U.S. 637, 645 (1974). And, when the trial court neglects to charge on the issue of identification, which is the primary defense at a criminal trial, a state conviction will not be upset if the obvious impact of the testimony, arguments of counsel, and other portions of the charge have adequately focused the jury's attention on the issue. E.g. *United States ex rel. Winfield* v. *Cascles*, 403 F.Supp. 956 (S.D.N.Y. 1975). See also *United States* v. *Evans*, 484 F.2d 1178, 1187-1188 (2d. Cir. 1973) (federal appeal).

from the time sequence of the events (A. 113). Alternatively, the court below thought that even if causation was generally before the jury, the instruction was inadequate to the complex legal issue (A. 113-116).*

The Court of Appeals' failure, and apparent refusal, to weigh the entire proceeding to ascertain if causation was presented to the jury in a constitutionally acceptable manner was clear error. As the dissent below found, the jury in this case was plainly aware that it must find beyond a reasonable doubt that defendants' conduct, not an intervening force, was the cause of Stafford's death (A. 118, 120). To suggest that this jury was inadequately focused on the issues of causation and foreseeability is to ignore the very lifeblood of the trial. The entire case, for both sides, was built on the dramatic issue of causation; indeed, no other defense to the murder charge was suggested.

This is not a case in which the trial judge neglected to charge on an element of the crime or improperly withdrew an issue from the jury's consideration. E.g. *United States* v. *Singleton*, 532 F. 2d 199, 204-207 (2d Cir. 1976); *United States* v. *Hines*, 256 F. 2d 561, 564 (2d Cir. 1958). The judge specifically informed the jury that causation was an element of the crime and that *all* elements of the crime must be proved beyond a reasonable doubt. Additionally, the jury had a copy of the indictment.

Nor was this charge sprung on the unwary; it was given to twelve jurors who for several days had listened to noth-

* The Court suggested that the two controlling questions as to which instructions should have been given were the foreseeability of the ultimate result of defendants' conduct and whether the victim failed to extricate himself from danger (A. 114-116). Foreseeability was clearly focused for the jury. The second issue, however, warranted no instruction in this case. First, the only case cited by the court below was an 1856 North Carolina case in which a victim reached a place of apparent safety and chose to forego it. *State* v. *Preslar*, 48 N.C. Rep. 421 (1856). This is hardly authority for a constitutional requirement that such an instruction be given. Second, the case is not applicable to the instant fact situation since there was no intimation, let alone evidence, that Stafford reached a refuge of which he chose not to avail himself.

ing but evidence and arguments of counsel on the issues of causation and foreseeability. The opening statement of the prosecution went directly to the heart of the case, arguing that defendants' conduct, while not the sole cause of death, nonetheless was responsible for and was a cause of death. As the court below found, the vigorous cross-examination of the motorist and medical examiner by defense counsel was specifically directed to the issue of causation.

Finally, the issues of causation and foreseeability were explicitly raised and discussed in the summations of the People and the defense.* The prosecutor argued that defendants' reckless conduct caused Stafford's death. He also carefully reiterated the circumstances surrounding Stafford's abandonment—his intoxication, his state of partial undress and lack of needed eyeglasses, the weather, and his placement on the side of the road opposite the nearest lighted structure—and argued that death by motor vehicle was clearly foreseeable in light of these circumstances.

Defense counsel discussed whose conduct had caused Stafford's death, read with emphasis the elements of second degree murder, and argued that there was reasonable doubt as to whether defendants were bound to anticipate death by a vehicle.** The importance of these summations should not be underestimated. See *Herring* v. *New York*, 422 U.S. 853, 862-863 (1975). The courts have uniformly held that a defendant's counsel has a right to make a closing summation to a jury (*id.* at 858 and n. 8), and in *Herring* this Court held that the same right inheres at a bench trial.

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* The court below discounted the summations because Kibbe's counsel told the jury that his remarks were not evidence and that the judge would instruct them (A. 113 n. 5). Of far greater significance, of course, is the fact that the trial court told the jury that counsel's arguments were advanced for the jury's assistance and could be followed as long as they were based on evidence received (A. 82).

** This Court is respectfully referred to the factual statement presented *ante* at 4-7 for details of the proceedings before the jury.

It is significant that the two defense atorneys, who well understood the issues in the case (*ante* at 4-6), did not object to the charge as given, obviously satisfied that in the context of the trial, the jury was well aware of its responsibilities. Indeed, even with the benefit of the hindsight afforded to them in reviewing the transcript for appeal, defense counsel were still satisfied that causation was properly before the jury. They did not challenge the jury charge in their briefs to the Appellate Division. Surely the judgment of the defendants' attorneys, whose competency has never been challenged, is entitled to considerable weight by reviewing courts.

In the circumstances of this trial, "the court's instruction was sufficient to enable the jury intelligently to go about its business." (Dissent, Court of Appeals, A. 120; *People* v. *Kibbe*, 41 A D 2d at 230). It is not a sufficient ground for overturning a state conviction that a federal court find an instruction "undesirable, erroneous, or even 'universally condemned' ". *Cupp*, 414 U.S. at 146. The only issue properly before the Court in this case is whether the challenged charge deprived Kibbe of a fundamentally fair trial. To isolate the absence of a specific definition of the word cause and speculate on the ways this could confuse the jury, while ignoring the context of the entire proceeding, was egregious error. The only question is whether the absence of a definition of cause or lack of more detail "so infected the entire trial so that the resulting conviction violates due process." *Id.* Properly analyzed in the context of the complete charge and the entire trial, the alleged error in the instruction manifestly did not deprive the jury of consideration of the element of causation. Kibbe's trial met the Fourteenth Amendment requirement of fundamental fairness.

B.

The deprivation of due process in a state criminal trial is the "failure to observe that fundamental fairness essential to the very concept of justice." *Lisenba* v. *California*,

314 U.S. 219, 236 (1941). This standard, which has been recently reaffirmed by this Court, *Donnelly* v. *DeChristoforo, supra,* 416 U.S. at 642-643; *Cupp,* 414 U.S. at 145-147; *Milton* v. *Wainwright,* 407 U.S. 371, 377 (1972), aptly describes the function of a federal habeas court reviewing a state conviction.

The jury instruction test propounded by this Court in *Cupp* is precisely adapted to this end. It requires that the challenged instruction be evaluated in the context of the whole proceeding to ascertain if it "so infected the entire trial that the resulting conviction violates due process." *Cupp,* 414 U.S. at 147. See also, e.g., *Pleas* v. *Wainwright,* 441 F.2d 56, 57 (5th Cir. 1971); *Byrd* v. *Hopper,* 402 F. Supp. 787, 788 (N.D. Ga. 1975); *United States ex rel. Birch* v. *Fay,* 190 F. Supp. 105, 107 (S.D.N.Y. 1961).

This Court has enunciated the *Cupp* standard in reviewing jury instructions given in federal trials, e.g. *United States* v. *Park, supra; Boyd* v. *United States, supra,* although not limited by the narrower principles governing federal intervention in state convictions. See *Donnelly* v. *DeChristoforo, supra,* 416 U.S at 642; *Cupp,* 414 U.S. at 145-146. The court below had applied the rule with regard to its own appeals before the case at bar reached review, e.g., *United States* v. *Evans, supra,* 484 F. 2d at 1187-1188; *United States* v. *Andreadis,* 366 F. 2d 423, 434 (2d Cir. 1966), and has continued to use the *Cupp* standard since it decided the instant case. E.g. *United States* v. *Magnano,* —— F. 2d —— (2d Cir. September 7, 1976) (Slip Op. 5471, 5477-5480). Certainly state convictions cannot be measured by any stricter test on collateral federal review.*

The failure of the Court of Appeals to properly evaluate the jury charge at issue not only violated the man-

* Cf. *Henderson* v. *Morgan,* —— U.S.——, 49 L. Ed. 2d 108, 119 (1976) (*Rehnquist,* J., dissenting) (". . . certainly no more stringent a standard could be applied as a matter of constitutional law on federal habeas review of state convictions [than in federal cases]").

date of *Cupp* but also undermined the fundamental fairness standard governing all habeas corpus review. Twice in recent terms this Court has reemphasized that not every trial error which might invoke the exercise of an appellate court's supervisory powers correspondingly constitutes a violation of the fundamental fairness standard. *Donnelly* v. *DeChristoforo, supra,* 416 U.S. at 642-643; *Cupp,* 414 U.S. at 145-146. In *Cupp,* this Court carefully noted that while the challenged presumption-of-truthfulness charge had been uniformly condemned, the federal courts had been exercising their supervisory powers over the trial courts in reversing convictions and prohibiting use of the instruction. *Id.* However, it is insufficient for federal review of state jury charges that the instruction be merely erroneous, undesirable, or even uniformly condemned; the narrower test of due process prevails in evaluating the instruction. *Id.*

The theory propounded by the court below to justify its conclusion that the alleged error reached constitutional dimensions actually works to undermine the fundamental fairness standard governing habeas review. The Court reasoned that when a trial court incompletely instructs on an element of the crime, that element is not before the jury for a determination beyond a reasonable doubt; accordingly, the Court said, the defendant is deprived of his right to have the reasonable doubt standard applied to each element of the crime before conviction (A. 112, 116-117).

This is a nebulous proposition which permits evasion of the fundamental fairness criterion. Under this theory any merely erroneous or confusing jury instruction which could not pierce the due process standard of *Lisenba* v. *California, supra,* can be struck down on the theory that its inadequacy infringes on the proof beyond a reasonable doubt requirement. The decision of the court below opens the doors of the federal habeas courts to hundreds of state prisoners who can now claim that the charge in their trials

contained an incomplete or inadequate instruction on a material element of the crime, and that accordingly, that element of the crime was not properly before the jury for a finding beyond a reasonable doubt. That few of these petitioners might prevail is of little moment to the federal courts who must hear and decide the cases, or to the state attorneys who must read the transcripts and file a response. Cf. *Schaefer* v. *Leone*, 443 F. 2d 182, 184 (2d Cir.), *cert. den.* 404 U.S. 939 (1971).

Principles governing application of the Due Process Clause and habeas corpus review mandate that the alleged error at Kibbe's trial be analyzed in light of the entire proceeding. Had the Court of Appeals properly applied this standard, it could only have concluded that respondent Kibbe received a fundamentally fair trial. Accordingly, the judgment of the court below should be reversed.

CONCLUSION

For the foregoing reasons, the decision below should be reversed.

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Respectfully submitted,

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